Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

LINDA S. WALDEN; JAMES P. MURPHY; GEORGE C. POIRIER,

Petitioners.

vs.

GEORGIA-PACIFIC CORP.; VIRGIL H. GARDNER; MICHAEL A. VIDAN; HOWARD SCHUTTE; DAVID M. WATSON; CURT RIGGIN; ROBERT LINDSEY; JAMES R. HURD; FELMER CUMMINS; GEORGE FOSTER; RICH MOODY; JOHN DOE; JANE DOE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are civil rights plaintiffs who proved a *prima facie* case of retaliation with direct evidence and mixed-motives evidence entitled to a jury instruction that shifts the burden of proof to the defendant and not a wholly inapplicable pretext charge?

2. May a corporate witness be impeached by the use of a tax fraud conviction to which the corporation has pleaded guilty when the conviction is not excludable under Federal Rule Evidence 609?

PARTIES TO THE PROCEEDING

Petitioners are Linda S. Walden, James P. Murphy and George C. Poirier, Plaintiff-Appellants below. Respondent is Georgia-Pacific Corporation, Defendant-Respondent below. All the remaining Respondents listed in the caption were dismissed prior to trial but were not removed from the caption.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions and Rule Involved	1
Statement of the Case	5
A. Introduction	5
B. Uncontested Facts	8
Issues Presented to the United States Court of Appeals for the Third Circuit	15
Reasons for Granting the Writ	17
I. The Petition Should Be Granted Because The United States Court Of Appeals For The Third Circuit Disregarded This Court's Prior Rulings By Holding That Plaintiffs Were Only Entitled To A McDonnell-Douglas Pretext Charge When Plaintiffs Had Presented A Direct Evidence Case At Trial.	17

Contents

	Page
A. Georgia-Pacific's Retaliatory Closure Of Its Open Door Policy Was Facially Discriminatory And Retaliation *Per Se.* ..	17
B. Georgia-Pacific's Threats To Plaintiffs To Withdraw EEOC Charges Or Face Termination Was Direct Evidence Of Its Retaliatory Intent And The Manner And Method Of Plaintiffs' Terminations After Their Open Door Complaints Was Further Direct Evidence Of Georgia-Pacific's Retaliatory Intent.	21
II. The Petition Should Be Granted Because The United States Court Of Appeals For The Third Circuit Disregarded Federal Rule Evidence 609(a)2 And This Court's Prior Rulings By Holding That Corporate Conviction Cannot Be Used To Impeach Corporate Witnesses.	23
Conclusion	27

TABLE OF CITATIONS

Cases Cited:

Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974) 18

Boykin v. Georgia-Pacific Corp., 706 F.2d 1384 (5th Cir. 1983) 8

Contents

	Page
Coon v. Georgia-Pacific Corp., 829 F.2d 1563 (11th Cir. 1987)	8
EEOC v. Board of Governors of State Colleges & Univs., 957 F.2d 424 (7th Cir. 1992)	18
Green v. Bock Laundry Mach. Co., 490 U.S. 504, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989)	5, 26
Int. Woodworkers of Amer. v. Georgia-Pacific Corp., 568 F.2d 64 (8th Cir. 1977)	8
Jefferson v. Georgia-Pacific Corp., Unreported Slip Opinion Civil Action No. 84-0505-R (E.D. Va. 1985)	8
Johnson v. Palma, 931 F.2d 203 (2d Cir. 1991)	20
Lambert v. Georgia-Pacific Corp., 38 Fair Empl. Prac. Cas. 745 (S.D. Ga. 1985)	8
Martin v. Georgia-Pacific, 568 F.2d 58 (8th Cir. 1977)	8
Owens v. New York City Housing Authority, 1994 U.S. Dist. LEXIS 3348, 1994 WL 97411 (S.D.N.Y. 1994)	20
Powell v. Georgia-Pacific Corp., 843 F. Supp. 491 (W.D. Ak. 1994)	8

Contents

Page

Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) 5, 7, 16, 23

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) 5

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985) 5, 20, 22, 23

United States v. New York City Transit Auth., 885 F. Supp. 442 (E.D.N.Y. 1995) 20

United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927) 5, 26

United States EEOC v. GMC, 826 F. Supp. 1122 (E.D. Ill. 1993) 18, 19, 20

Walden v. Georgia-Pacific Corp., 126 F.3d 506 (3rd Cir. 1997) 1

Woodson v. Scott Paper, 109 F.3d 913 (3rd Cir. 1997) 6

Statutes Cited:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 8

42 U.S.C. § 2000e, *et seq.* 2, 8

Contents

	Page
42 U.S.C. §§ 2000e-2000e-17	2, 3
42 U.S.C. § 2000e-2	1
42 U.S.C. § 2000e-2(m)	6
42 U.S.C. § 2000e-3	2
42 U.S.C. § 2000e-3(a)	6
42 U.S.C. § 2000e-5(g)(2)(B)	7

Rules Cited:

Fed. R. Evid. 403	26
Federal Rule Evidence 609	i, 3, 5, 16, 25, 26
Federal Rule Evidence 609(a)2	23, 25, 26

Other Authority Cited:

Brooks, Note, *Employment Discrimination — The Supreme Court Liberates Title VII Mixed Motives Cases from the Procrustean Bed of the McDonnell Douglas/ Burdine Pretext Model — Price Waterhouse v. Hopkins*, 25 Wake Forest L. Rev. 345, 365, 375 (1993) 7

Contents

Page

APPENDIX

Appendix A — Opinion And Order Of The United States Court Of Appeals For The Third Circuit Filed September 26, 1997 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated November 20, 1997 ..... 33a

Linda S. Walden, James P. Murphy and George C. Poirier, Plaintiff-Appellants below, petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3rd Cir. 1997) (App. A).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 26, 1997. The Third Circuit denied a timely petition for rehearing on November 18, 1997 (App. B).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(m) Except as otherwise provided in this title [42 U.S.C. §§ 2000e, *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e-2000e-17], or because he has made

a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 U.S.C. §§ 2000e-2000e-17].

* * *

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonestly or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later

date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a

conviction inadmissible. Evidence of the pendency of an appeal is admissible.

STATEMENT OF THE CASE

This case involves two fundamental questions. The first fundamental question is whether the petitioners, in a civil rights employment case, were entitled to a new trial when the district court committed clear error by giving the trial jury a McDonnell-Douglas charge after plaintiffs proved their case by direct evidence which, under prior Supreme Court precedents, required the jury to be instructed that the burden of proof had shifted to the defendant employer. The opinion and judgment of United States Court of Appeals for the Third Circuit, by failing to reverse the district court and grant a new trial, is contrary to this Court's rulings in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) and is contrary to the decisions of other United States Court of Appeals.

The second fundamental question is whether United States Court of Appeals for the Third Circuit may rewrite Fed. R. Evid. 609 and ignore prior precedents of this Court in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927) and *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989) by holding that a corporate witness may not be impeached by a nonexcludable tax fraud conviction unless the party can show that the witness was involved in the criminal acts that lead to the corporate conviction.

A. Introduction

In August of 1992, plaintiff-petitioners (plaintiffs) filed retaliation charges under the 1991 Civil Rights Act with the

EEOC for the unexpected termination of their employment with defendant-respondent Georgia-Pacific Corporation (Georgia-Pacific) on February 22, 1992. This charge of retaliation was filed after the plaintiffs had cooperated in an EEOC investigation in July of 1991; filed their own charges of retaliation in August of 1991; and then used the Georgia-Pacific's own open door policy to file a written complaint about retaliation with a Senior Vice President. All of these activities are protected under 42 U.S.C. § 2000e-3(a). The EEOC stopped its mediation and settlement efforts after the plaintiffs were fired and issued a right to sue letter. Plaintiffs filed their complaint in the United States District Court for the District of Delaware and went to trial on one count of retaliation under 42 U.S.C. § 2000e-3(a).

After the plaintiffs' direct evidence case was presented, the district court refused a direct evidence charge. The district court also refused to charge the jury that plaintiffs could prove retaliation by showing that it was "a motivating factor . . . even though other factors also motivated the practice" as required by the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(m). Just before the oral argument before the Third Circuit in this case the Third Circuit held that the "motivating factor" mode of proof required by the Civil Rights Act of 1991 only applied to actual discrimination claims and not to retaliation claims that arise out of initial discrimination claims. *Woodson v. Scott Paper*, 109 F.3d 913, 935 (3rd Cir. 1997). The Third Circuit acknowledged the split in the circuits concerning this issue and held that retaliation plaintiffs are not entitled to the remedial protection that Congress bestowed on plaintiffs making substantive discrimination claims. *Woodson v. Scott Paper*, 109 F.3d at 935. The Third Circuit then refused to address this issue in this case citing *Woodson*. App. 7a n.4.

Likewise, the Third Circuit cited *Woodson* to justify not reversing the district court's refusal of the statutory burden

shifting charge which would have required the defendant to prove that it "would have taken the same action in the absence of the impermissible motivation factor." 42 U.S.C. § 2000e-5(g)(2)(B). The plaintiffs requested, as an alternative, a mixed-motives charge under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). The trial judge denied the plaintiffs' request.

To be entitled to a *Price Waterhouse* burden shifting charge a plaintiff needs to set forth sufficient evidence that the illegitimate motive was a "motivating" factor in the employment decision. *Price Waterhouse*, 490 U.S. at 251-52, 256-7. The plurality opinion never explicitly answered whether the plaintiff needs to set forth direct or circumstantial evidence before the burden can be shifted to the employer. Justice Brennan did imply that both direct and circumstantial evidence would be sufficient. *Id.* at 251-52. Justice O'Connor did, however, address the type of evidence needed. Justice O'Connor concluded that before the burden will shift to the defendant to show that it would have made the same decision, the plaintiff must first prove through "direct evidence" that the illegitimate reason was a substantial factor. *Id.* at 276.

The *Price Waterhouse* decision has left the courts of appeals struggling to determine what standards of causation and what evidentiary standards are proper in a Title VII mixed-motives case. Brooks, Note, *Employment Discrimination — The Supreme Court Liberates Title VII Mixed Motives Cases from the Procrustean Bed of the McDonnell Douglas/Burdine Pretext Model — Price Waterhouse v. Hopkins*, 25 Wake Forest L. Rev. 345, 365, 375 (1993). By rejecting the plaintiffs' direct evidence in the instant case the Third Circuit announced an unduly restrictive and unrealistic evidentiary standard for plaintiffs to meet in future cases. The Third Circuit in substance held that to be entitled to a mixed motives charge a plaintiff must show that

either the CEO of the corporate defendant must have personally make statements that are indicative of the relevant discriminatory animus and/or the supervisor who testified that he made the decision complained of must have personally made statements that are indicative of the relevant discriminatory animus. App. 7a-14a.

B. Uncontested Facts

Georgia-Pacific employs thousands of employees at plants scattered throughout the United States. Starting as early as 1970's, Georgia-Pacific's employment practices at plants across the country were challenged under Title VII and other federal and state laws against discrimination.[1] In response to these challenges, Georgia-Pacific developed a corporate attitude about legal actions by its employees. In a monthly EEO Issues

1. *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491 (W.D. Ak. 1994) (a Title VII class action race discrimination case filed in 1973); *Martin v. Georgia-Pacific*, 568 F.2d 58 (8th Cir. 1977) (a Title VII class action race discrimination case); *Int. Woodworkers of Amer. v. Georgia-Pacific Corp.*, 568 F.2d 64 (8th Cir. 1977) (International Woodworkers of America and its Local 5-475 brought a class action under 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.* for racially discriminatory employment practices on the part of Georgia-Pacific); *Boykin v. Georgia-Pacific Corp.*, 706 F.2d 1384 (5th Cir. 1983) (class action brought under Title VII to challenge alleged racial discrimination in the initial assignment and promotion of blacks at the Georgia-Pacific chip-n-saw mill in rural Goss, Mississippi); *Lambert v. Georgia-Pacific Corp.*, 38 Fair Empl. Prac. Cas. 745 (S.D. Ga. 1985) (a 1984 Title VII sexual harassment complaint); *Jefferson v. Georgia-Pacific Corp.*, Unreported Slip Opinion Civil Action No. 84-0505-R (E.D. Va. 1985) (a 42 U.S.C. § 1981 action against defendant by a white male former supervisory employee for mistreatment on account of his efforts to ensure that black employees at Georgia-Pacific's plant in Emporia, Virginia, were treated equally); *Coon v. Georgia-Pacific Corp.*, 829 F.2d 1563 (11th Cir. 1987) (a Title VII sex discrimination case).

newsletter read by its human resources personnel, the company revealed its hostile corporate state-of-mind in writing by stating, "people who mind their own business will never be unemployed." After this brazen retaliatory attitude was publicly announced, corporate officers at high levels wholeheartedly adopted that outlook which eventually filtered down to the plant level, becoming a company-wide policy. This corporate attitude ultimately led to the unexpected termination of the Wilmington plant manager, Montgomery Palmowski, in December of 1991, the closing of Georgia-Pacific's open door policy, and the subsequent termination of plaintiffs' employment on February 22, 1992.

Between 1990 and 1992, Georgia-Pacific Corporation's Gypsum and Roofing Division was run by a close knit management group headquartered in Atlanta, Georgia. Donald Glass, the Division's Senior Vice-President supervised Michael Vidan, the Division's Vice President. Howard Schutte, the Division's Operations Manager, was headquartered in Atlanta and reported directly to Vidan; David Watson, the Division's Production Manager, was headquartered in Atlanta and reported directly to Schutte. James Hurd, Corporate Personnel and Labor Relations Manager for the Division, reported directly to Vidan. Hurd supervised Virgil H. Gardner, who was the Division's Manager of Industrial Relations and EEO Coordinator.

The management at the Wilmington plant was under this small and close knit group of high level managers in Atlanta. Montgomery Palmowski was Wilmington's Plant Manager from the fall of 1982 until December 3, 1991. Palmowski reported directly to Watson in Atlanta. Charles Terry was the interim Wilmington plant manager after Palmowski was fired. Terry reported only to Schutte, who was Watson's supervisor in Atlanta. Carolyn Wunsch was Wilmington's personnel manager. Wunsch was plaintiffs' direct supervisor and had been trying to

convince Palmowski that he should get rid of the plaintiffs ever since the first EEOC charge by a security guard in October 1990 and plaintiff Walden's testimony in January 1991 at an arbitration hearing. Wunsch reported regularly to both Hurd and Gardner in Atlanta about personnel matters including EEOC activity at the Wilmington plant. Robert Lindsey was hired by James Hurd in January 1992 to replace Wunsch as Wilmington's personnel manager. When Lindsey became plaintiffs' direct supervisor, he refused to talk to the plaintiffs under the open door policy pursuant to directions from Atlanta.

In August 1990, John Crothers, one of four Georgia-Pacific security guards working at the Wilmington plant, was suddenly fired by Carolyn Wunsch. Crothers was replaced by a female under the age of 40, Phyllis Lynn Estepp, in September 1990. In October, 1990, Crothers promptly filed a charge of age and sex discrimination with the EEOC. Crothers named all three plaintiffs as witnesses regarding his discrimination charges against Georgia-Pacific.

In January 1991, plaintiff Walden was subpoenaed as a witness in an arbitration hearing for a union employee, Raymond Gottshall. Virgil Gardner was referring to plaintiff Walden when he asked Gottshall what that "cunt" was doing at the hearing. Attempting to intimidate Walden, Gardner told the union employee that "you should leave people out of this, especially people that aren't in the union because they will lose their job over it." Mr. Palmowski also testified about Gardner's hostility: "He leaned over to me and said, What the hell is she doing here?" About Gardner's demeanor, Palmowski stated, "He was very upset. She was a non-union hourly employee at a union employee arbitration."

On May 7, 1991, all three plaintiffs were instructed by Wunsch to meet with Ms. McLean, an EEOC investigator,

concerning Crothers' charges of discrimination. Wunsch wanted the plaintiffs to mislead the EEOC investigator and to give statements favorable to the company. At a meeting on May 14, 1991, Wunsch announced that Estepp would be replaced by OSS, an outside security agency who would work just on the weekends. Poirier, Murphy and Walden offered at that May 14th meeting to give up their premium time on weekends so that all four guards could stay employed. Wunsch would not consider this offer. Georgia-Pacific later claimed that it hired OSS to save the cost of the premium time, which plaintiffs had offered to give up. OSS hired untrained people who worked for minimum wage. The workers were transient, unskilled, and felt that the job was too demanding for the money they were getting paid. The decision to reduce the guard force had actually been made at headquarters in Atlanta because of plaintiffs' protected activity.

Plaintiff Walden, concerned about her position at the plant, called Howard Schutte in Atlanta on May 15, 1991. Schutte was out of town. Dave Watson answered the line and asked if he could help. When plaintiff Walden expressed her concern about the terminations and changed working conditions, Watson stated that there were no plans to further reduce the remaining guards at Wilmington. Watson claimed that Estepp's termination was his plan and that no plans existed for further reductions at the Wilmington plant. This evidence contradicted Schutte's trial testimony that the plan to get rid of all of the plaintiffs went back to February or March of 1991.

Palmowski later admitted to Estepp that she had been laid-off because of Crothers' EEOC charge. Estepp then filed a charge of discrimination with the EEOC on May 23, 1991 against Georgia-Pacific, stating what Palmowski had told her. On June 6, 1991, Gardner received a copy of the EEOC charges filed by Estepp.

Gardner informed Vidan, Hurd, Schutte and Watson of Estepp's charges. Vidan circled Estepp's matter and asked for more details on July 9, 1991. In response, Gardner sent a memo dated July 11, 1991 to Vidan, Hurd and Schutte with a copy to Palmowski. In this memo, Gardner wrote that plaintiffs were, "the sick, lame and lazy" and "their loyalties do not rest with the company's best interests." Incensed by the this third incident of protected activity at the Wilmington plant, Division EEO Coordinator Gardner recommended the replacement of the plaintiffs by the temporary outside security service OSS.

After speaking to the EEOC investigator on May 7, 1991, Wunsch changed the working conditions of the plaintiffs to put pressure on the plaintiffs who along with the other plant workers were complaining about the quality of the outside security service. The outside security agency, OSS, only provided security coverage on the weekends while the plaintiffs provided security during the work week on a 24 hour basis. Because their working conditions were changing drastically, the plaintiffs decided to file their own charges with the EEOC in August of 1991.

In August 1991, after the plaintiffs filed individual EEOC charges of retaliation, Wilmington plant management personnel started making hostile remarks to the plaintiffs in reference to their EEOC charges. The Wilmington plant's Production Manager, George Woodham, threatened the plaintiffs saying, "[You] should all be fired, [you] were disloyal to the company." Woodham stated, "that he should have fired all of [them] when they got rid of Estepp, and that she was a trouble maker too." Woodham echoed company policy from the 1984 EEO newsletter when he said, "[P]eople that do not mind their own business, and meddle in EEOC business, don't have jobs very long at [the] Georgia Pacific Corporation." Watson was close to Woodham and had known him for some 30 years. When Watson

needed strings pulled at the Wilmington plant, he would go to Woodham. Watson was using Woodham to intimidate the plaintiffs.

Woodham's subordinate warehouse superintendent, Robert Fuller, threatened plaintiffs by saying that "if he was [their] boss [they] would all be fired. [He'd] bring the agency guards in here so fast [their] heads would spin!" Fuller told plaintiffs that they were "disloyal" to the company. "They pay you, you should be loyal to them. You would all be fired, if I was your boss." This was a key piece of evidence because Fuller was a former security guard and could train replacements if the defendant fired the plaintiffs out of retaliation. Plaintiffs worked with Fuller when he was a security guard, and management knew that Fuller's threats would be meaningful to the plaintiffs.

In late September or early October 1991, Georgia-Pacific received its notice of the plaintiffs' EEOC charges. Watson immediately placed a call to Palmowski at the Wilmington plant. Palmowski testified that "He (Watson) was upset" and that Watson told Palmowski "We can't have bullshit like this" and "We have to end this situation now. It's gone too far." On October 1, 1991, Palmowski then "stormed" into the guard house and confronted plaintiffs Walden and Poirier with their charges. Palmowski told plaintiffs that Atlanta was upset and that they should consider dropping or withdrawing the EEOC charges because "the timing was absolutely poor." Palmowski testified, "[W]ell, I was being pressured by Atlanta to eliminate their jobs, and I didn't want to."

Believing in the company's open door policy, plaintiffs decided to write a letter outlining their concerns to headquarters. On October 25, 1991 the plaintiffs jointly sent a letter of complaint to the Senior Vice President, Donald Glass, the former Vice President of the Gypsum and Roofing Division. Glass

passed this letter down to Michael Vidan, the division's Vice President, to be handled by him. Vidan sent all three plaintiffs a letter on November 14, 1991 which informed them that he had instructed Hurd to investigate the matter thoroughly and that Hurd would get back to them and address their concerns.

According to company policy, Plant Manager Palmowski was the only person who had the authority to replace personnel at the Wilmington plant. Watson had been pressuring Palmowski to replace the plaintiffs with OSS on the week days when a functional security unit was most important to a smoothly operating production plant. Palmowski refused because it would not actually save costs. Palmowski testified that he believed that it was basically a bad idea because it could easily impair plant safety and increase costs resulting from damage to plant property, employee injuries, and employee absences.

On December 3, 1991, Schutte and Watson arrived unexpectedly at the Wilmington plant and fired both Palmowski and Wunsch. Palmowski and Wunsch when they did not fire the plaintiffs and could not get them to withdraw their EEOC charges. From Atlanta's point of view, Palmowski was completely ineffective because, after Palmowski threatened the plaintiffs and told them to drop their charges, plaintiffs went over Palmowski's head and wrote to Senior Vice President Donald Glass in Atlanta. After Palmowski's termination, plaintiff Walden tried to speak to Wilmington plant officials about her retaliation complaints. She was told that her complaints were a "hot potato" and that Wilmington plaint management had been instructed to stay out of it. In December 1991, plaintiff Walden approached Interim Plant Manager Terry, who had replaced Palmowski, and attempted to speak to him under the open-door policy about her pending EEOC charges and concerns. Terry informed Walden that he would call Schutte and get back to her. In January 1992, plaintiff Walden approached Plant

Manager Riggen, who replaced Terry. He informed her that he too had been instructed by Schutte to stay out of the guard matter.

The plaintiffs were becoming increasingly concerned because Hurd had not contacted any of them regarding his investigation. While Hurd was visiting the Wilmington plant in January 1992, he told Murphy to tell Linda Walden and George Poirier they had not been forgotten: "Their case was still being investigated and that their jobs were secure."

On February 21, 1992, Hurd arrived at the Wilmington plant and permanently terminated the employment of the plaintiffs. Prior to the plaintiffs' termination, the EEOC had been pressing Georgia-Pacific to schedule a fact finding hearing in plaintiffs' case. After the plaintiffs were terminated, the EEOC investigation died. Schutte's response from Atlanta to plaintiffs' open door letter was to have Hurd hold out on the promised investigation of the Wilmington plant, to fire Palmowski and Wunsch, and to send Hurd to Wilmington to fire the plaintiffs, thus making them an example to the whole plant.

Because plaintiffs felt that the distinct court committed numerous errors, the most serious of which was giving the trial jury a confusing pretext charge, the plaintiffs appealed to the United States Court of Appeals for the Third Circuit.

ISSUES PRESENTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiff-respondents raised the following issues before the United States Court of Appeals for the Third Circuit:

1. Were plaintiffs entitled to a new trial when the district court gave the jury an inappropriate pretext charge, failing to

shift the burden of proof to the defendant as required by the 1991 Civil Rights Act or *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), after plaintiffs presented undisputed direct evidence of discriminatory animus?

2. Were plaintiffs entitled to a new trial when the district court refused to charge the jury with the defendants' admitted retaliatory foreclosure of Georgia-Pacific's open-door policy because the plaintiffs filed a charge of retaliation with the EEOC?

3. Were plaintiffs entitled to a new trial because the District Court excluded direct evidence of discriminatory animus which would have been unrefuted at trial?

4. Were plaintiffs entitled to a new trial because the district court excluded a wealth of relevant pretext evidence?

5. Were the plaintiffs entitled to a new trial because the district court erroneously excluded critical impeachment evidence of the defendant Corporation's conviction for a $24,000,000 tax fraud which could not be excluded under Fed. Rule of Evid. 609 as decided by the Third Circuit and this Court?

In holding against the plaintiffs on all issues, the United States Court of Appeals for the Third Circuit has ignored significant landmark civil rights cases of this Court and has ignored the remedial purpose of Title VII.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DISREGARDED THIS COURT'S PRIOR RULINGS BY HOLDING THAT PLAINTIFFS WERE ONLY ENTITLED TO A MCDONNELL-DOUGLAS PRETEXT CHARGE WHEN PLAINTIFFS HAD PRESENTED A DIRECT EVIDENCE CASE AT TRIAL.

The plaintiffs at trial directly proved their case of retaliation in two ways. First, the plaintiffs proved a *per se* violation when they proved that Georgia-Pacific closed its open door policy because the plaintiffs filed charges with the EEOC. Second, the plaintiffs proved that Georgia-Pacific threatened to fire them if they did not withdraw their EEOC charges and did fire them when they did not withdraw their EEOC charges.

A. Georgia-Pacific's Retaliatory Closure Of Its Open Door Policy Was Facially Discriminatory And Retaliation *Per Se*.

Plaintiffs proved the closure of Georgia-Pacific's open door policy with undisputed evidence. At trial James Hurd's deposition testimony was read to the jury. Mr. Hurd testified as follows:

> . . . As I explained earlier, the policies written were that they come to the company with their complaints, so we could properly investigate as promptly as possible and satisfactions made to that complaint and whatever facts are appropriate in order to do it.
>
> But we don't do it when there is a formal complaint filed with the EEOC. . . .

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-51, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), this Court held that an employer or union may not force an employee to elect either collective bargaining or a statutory remedy under Title VII. Following this authority, cases decided in circuits other than the Third Circuit are in unanimous agreement that the closing of an open door policy in any manner because employees have filed charges with an outside agency which is actionable as retaliation *per se*. The United States Court of Appeals for the Third Circuit is the only circuit that has faced this issue and failed to recognize the closure of an open door policy as a cause of action.

In *EEOC v. Board of Governors of State Colleges & Univs.*, 957 F.2d 424 (7th Cir. 1992), the EEOC challenged the legality of a collective bargaining agreement provision that denied employees their contractual right to a grievance proceeding whenever the employee initiated a claim, including a claim of age-based discrimination, in an administrative or judicial forum. The Seventh Circuit had little trouble finding the policy discriminatory on its face leaving the Board with no defense to this discriminatory policy. In a case virtually identical to this case, *United States EEOC v. GMC*, 826 F. Supp. 1122 (E.D. Ill. 1993), the court held that the suspension of a company's "open door policy" policy due to the filing of an EEOC charge was a violation of the retaliation statutes of Title VII and the ADEA. In this case the court stated:

> . . . Since 1941, GM has had an "open door" policy, an informal dispute resolution procedure, through which salaried employees may seek investigation and resolution of employment-related problems. Under the "open door" policy, an employee makes a complaint to his or her supervisor. If not resolved, GM staff members in the personnel department at

> the employee's facility investigate and attempt to resolve the complaint. If the employee is dissatisfied with the Personnel Director's determination at the local facility or divisional level, he or she may request review by GM's Central Office in Detroit, Michigan. The Central Office reviews the charge and, if necessary, reinvestigates. A final determination is then made as to whether GM will voluntarily provide a remedy to the employee's satisfaction.
>
> When an employee files a claim with the EEOC or another administrative agency, GM "defers" allowance of use by an employee of the "open door" policy until the matter is resolved with the agency. GM staff in the local personnel department still investigate the charge and report their findings to the Central Office, but a determination is made as to whether and to what extent GM will resolve the complaint through the EEOC's conciliation procedures, rather than through its own procedures. Thus, the "open door" procedure is unavailable to a salaried employee once he or she files a grievance with the EEOC or another agency. (footnotes omitted).

Id. at 1124.

> GM admits that an employee may proceed through its internal "open door" policy or through EEOC procedures, but not both. Such a policy adversely affects an employee by stripping him or her of an employment privilege for filing with the EEOC. Such activity is expressly prohibited by the literally interpreted provisions of both the ADEA and Title VII. This court therefore finds that GM's

> policy violates the ADEA and Title VII and EEOC's motion for partial summary judgment is accordingly granted.

Id. at 1126.

The Second Circuit is in accord with the Seventh Circuit. In *Johnson v. Palma*, 931 F.2d 203, 207-208 (2d Cir. 1991), the Second Circuit Court of Appeals held it unlawful for a union to refuse to process an employee's grievance against the employer because the employee also filed a charge of employment discrimination with an outside agency. *See also Owens v. New York City Housing Authority*, 1994 U.S. Dist. LEXIS 3348, 1994 WL 97411 *3 (S.D.N.Y. 1994) (employee is entitled under the ADEA "to the same opportunity to resolve disciplinary charges enjoyed by other employees who may not have filed an EEOC complaint"); *United States v. New York City Transit Auth.*, 885 F. Supp. 442 (E.D.N.Y. 1995) (court found that the defendants refusal to follow its procedure for the investigation and informal settlement of employment discrimination complaints because of formal complaints to state or federal agencies was prohibited retaliation).

These cases are in accord with *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523 (1985) where the plaintiffs asserted age discrimination claims and brought suit under the Age Discrimination in Employment Act. The *Thurston* plaintiffs asserted that TWA's transfer policy violated the ADEA because the same employment privileges for employees forced to retire at age 60 were different for employees displaced for reasons other than age. The TWA policy constituted "direct evidence" of age discrimination because the policy was not facially neutral. In *Thurston* only pilots were forced to retire at age 60 while other employees could retain their jobs. *Id.* at 118. This is

substantially similar to a policy of only allowing employees who do not file discrimination or retaliation claims with outside agencies under federal or state law to utilize a companies open door policy to make those same claims. Such policies are discriminatory on their face and *per se* violations.

In the instant case, when the plaintiffs proved an adverse employment action by showing that Georgia-Pacific's upper management in Atlanta used a policy of closing the open-door policy when EEOC charges were filed by employees who are attempting to use the open-door policy. At the Wilmington plant, Howard Schutte from defendant's Atlanta headquarters, closed the open door policy at the plant level because of plaintiffs' EEOC charges and then completely foreclosed any possibility of the plaintiffs using that policy when he terminated their employment. Georgia-Pacific's retaliatory closing of its open door policy when EEOC charges were filed was discriminatory on its face.

B. Georgia-Pacific's Threats To Plaintiffs To Withdraw Eeoc Charges Or Face Termination Was Direct Evidence Of Its Retaliatory Intent And The Manner And Method Of Plaintiffs' Terminations After Their Open Door Complaints Was Further Direct Evidence Of Georgia-Pacific's Retaliatory Intent.

Plaintiffs proved in the core of their case that Georgia-Pacific's management in Atlanta told the Wilmington plant manager, Montgomery Palmowski, to have the plaintiffs withdraw their EEOC charges or to fire the plaintiffs. Palmowski informed the plaintiffs that the punishment for being disloyal to the defendant by filing EEOC charges was termination of their employment. Plaintiffs countered by going over Howard Schutte's head in Atlanta with a letter to Senior Vice President Donald Glass in which plaintiffs complained about having to

file EEOC charges for retaliation and asked for an investigation of what was going on at the Wilmington plant. Rather than investigate, the defendant admittedly stopped any investigation solely because the plaintiffs had filed EEOC charges. While leading the plaintiffs to believe that management is Atlanta was investigating, management plotted to clear the way for the plaintiffs' termination. To accomplish this, Schutte fired Palmowski and his personnel manager Carolyn Wunsch, who directly supervised the plaintiffs. Schutte took this action because, by company policy the plant manager had complete say in who was hired or fired at the plant level. Schutte, a high level manager in Atlanta, then told all of the managers at the Wilmington plant who could have kept the plaintiffs employed to close the open door policy at the plant level by refusing to speak to the plaintiffs about their job security. Schutte then sent James Hurd, who stopped the investigation of the Wilmington plant, to fire the plaintiffs. This all took place in approximately six months.

Around this core of direct evidence, at trial plaintiffs showed through a plethora of other evidence an escalating pattern of retaliation. Although plaintiffs overwhelmingly proved their case with direct and circumstantial evidence, the district court incorrectly gave a pretext charge.

The Third Circuit commits grievous error by holding that the trial court properly gave an inadequate pretext charge when plaintiffs unquestionably presented a direct evidence case or, at least, a case that was in no way meant for a McDonnell Douglas type of pretext charge. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621-22, 83 L. Ed. 2d 523 (1985), this Court stated that the McDonnell Douglas framework does not apply to situations where the plaintiff has produced direct evidence of discrimination. This Court further explained that the McDonnell Douglas framework promotes a policy of

allowing plaintiffs whose claims consist only of circumstantial evidence to have their day in court. *Thurston*, 469 U.S. at 121. When a plaintiff offers direct evidence of discrimination, as in *Thurston*, the McDonnell Douglas framework is inapplicable.

Furthermore, when the Third Circuit held that plaintiffs' proofs did not require a burden shifting charge the court ignored the holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DISREGARDED FEDERAL RULE EVIDENCE 609(a)2 AND THIS COURT'S PRIOR RULINGS BY HOLDING THAT CORPORATE CONVICTION CANNOT BE USED TO IMPEACH CORPORATE WITNESSES.

On October 2, 1991, the Georgia-Pacific Corporation pleaded guilty to the criminal offense of tax evasion. The government recommended a fine of $5 million and an agreement with the IRS which required for the Georgia-Pacific Corporation to pay a $16 million deficiency, plus interest and civil penalties. U.S. Attorney Joe Whitley stated that the case "should go down in the record books as one of the largest, if not the largest" case of white-collar crime in Georgia to date. To facilitate its tax fraud, Georgia-Pacific created false and fraudulent reports concerning its plans for swamp land which it had claimed as a $24 million tax deduction. Georgia-Pacific executives willfully prepared a false trail of reports meant to deceive outside interests. The scheme also involved Georgia-Pacific Corporation employees who showed the land to an appraiser. These employees misled the appraiser concerning the value of the land

to obtain an appraisal that assigned an inflated market value of $24 million to a property for which Georgia-Pacific only paid $2 million.

The United States Attorney released information to the public concerning this fraud stating:

> The following Georgia-Pacific officers and executives have been identified — through public record documents; news articles and interviews — as the core group of Georgia-Pacific officers and executives involved in the Santa Fe Swamp transactions: Executive Vice President Davis K. Mortensen, former Director of Corporate Taxes, Hugh Overcash, Senior Vice President Daniel A. Martinez, Senior Counsel and Assistant Secretary Phillip M. Armstrong, and Woodlands Manager for the company's Southern District, G. William McVicker, Jr.
>
> Georgia-Pacific's recent guilty plea in U.S. District Court follows a two-year grand jury investigation in the charges that the company claimed an unlawful deduction on its 1984 income tax return. The company was sentenced October 8 [1991] in U.S. District Court to $21 million in fines and penalties.
>
> * * *
>
> For much of April 1984, Mortensen a man the Wall Street Journal reported is considered a "possible successor" to Hahn focused on the wetlands issue.
>
> * * *

> The company filed its 1984 tax form 1120 in September 1985. When audited by the IRS in June 1986, "officers and executives in [Georgia-Pacific's] Tax Department" produced the bogus appraisal "in support of its claim that the Santa Fe Swamp maintained a fair market value of $24 million as of the date of the donation," the indictment states.

There is no dispute that Georgia-Pacific's criminal conviction for tax evasion was admissible under Fed. R. Evid. 609(a)(2). Fed. R. Evid. 609 as amended December 1, 1990, provides in pertinent part:

> (a) General rule. For the purposes of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Despite the clear wording of Fed. R. Evid. 609(a)(2) and despite this Court's prior precedents, the United States Court of Appeals for the Third Circuit has now held that a party in a civil case may not use an admissible conviction to impeach the

credibility of a corporation unless a corporate employee who was actually involved in the offense for which the corporation was convicted is on the witness stand. This holding is inconsistent with this Court's prior rulings.

In *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527, 109 S. Ct. 1981, 104 L. Ed. 2d 557 (1989), this Court resolved a split among the circuit courts by holding that Fed. R. Evid. 609's mandatory language does not allow exclusion under Fed. R. Evid. 403 even in civil cases. Prior to enactment of the Federal Rules of Evidence, this Court held that it was proper on cross-examination to ask a corporate manager if he was aware that his employer had previously pled guilty to a violation of the Sherman Act. This Court found that admission of this evidence would not be improper

> if admissibility were urged on the ground that it was directed to the bias of the witness. . . . or that it was preliminary to showing his implication in this supposed offense, and thus affecting his credibility.

United States v. Trenton Potteries Co., 273 U.S. 392, 404-05, 71 L. Ed. 700, 708, 47 S. Ct. 377, 382. (Citations omitted).

It is fundamental law that a corporation can only act and testify through its agents and employees. Furthermore, in civil trials, corporations are entitled to be treated as any citizen and are entitled to a jury instruction so informing the jury. This instruction was given at the trial of this case, however, plaintiffs were denied their right of impeachment. To hold that Fed. R. Evid. 609(a)2 does not apply to corporations gives them an unconstitutional status above all other citizens. This is patently unfair.

CONCLUSION

Accordingly, the petitioners request that their petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 26, 1997

Filed September 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7045

LINDA S. WALDEN; JAMES P. MURPHY;
GEORGE C. POIRIER,
APPELLANTS

v.

GEORGIA-PACIFIC CORP.; VIRGIL H. GARDNER; MICHAEL A. VIDAN; HOWARD SCHUTTE; DAVID M. WATSON; CURT RIGGIN; ROBERT LINDSEY; JAMES R. HURD; FELMER CUMMINS; GEORGE FOSTER; RICH MOODY; JOHN DOE; JANE DOE

On Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. No. 92-cv-00735)

Argued: June 5, 1997

Before: BECKER, SCIRICA, *Circuit Judges*, and
KELLY, *District Judge*.*

(Filed September 26, 1997)**

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*Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

**A non-final draft of the Opinion in this matter was issued September 23, 1997, by reason of certain mechanical errors. That version has been rescinded, and the correct final draft is filed herein.

Appendix A

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This is an appeal by plaintiffs Linda S. Walden, James P. Murphy, and George C. Poirier from an order of the district court denying them a new trial in an employment discrimination case following a jury verdict in favor of the defendant, Georgia-Pacific Corporation. The plaintiffs contend that the district court abused its discretion in not granting them a new trial in the face of errors in the jury charge and in the exclusion of certain evidence. We affirm.

First, we reject plaintiffs' contention that their proffered evidence of retaliatory animus was sufficiently "direct" to require a burden shifting "mixed-motives" charge under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Second, while we believe that the district court erred in excluding certain evidence of retaliatory animus, we do not believe

that it committed plain error in doing so. The evidence involved remarks by Georgia-Pacific employees outside the chain of decisionmakers who had authority to hire and fire the plaintiffs. The district court excluded the evidence at an *in limine* hearing, at which time the district court described its actions as only "tentative". Although the district court gave certain indications at the hearing that its rulings might be final, it never countermanded its description of them as "tentative." Thus, we do not believe that the rulings were sufficiently final under the doctrine of *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985), to excuse the plaintiffs' obligation to make an offer of proof at trial and to preserve the issues for abuse of discretion review. Since no objections were made at trial, we review only for plain error and, inasmuch as the excluded evidence was cumulative of other evidence of corporate animus (which the jury obviously rejected), we find none.

Finally, addressing a question of first impression at the circuit level, we reject plaintiffs' contention that the district court erred in excluding evidence of the conviction of Georgia-Pacific for tax evasion which plaintiffs offered to impeach the defendant's witnesses. We conclude that Fed. R. Evid. 609 does not permit corporate convictions to be used to impeach the credibility of employee witnesses who are not directly connected to the underlying criminal act. Since there was no evidence of such a connection in the present case, the district court properly excluded the Georgia-Pacific convictions as improper impeachment evidence.

I. *Facts and Procedural History*

The plaintiffs, Walden, Murphy, and Poirier, constituted the security unit at the Wilmington, Delaware, plant of Georgia-Pacific's Gypsum and Roofing Division. Walden was hired as a guard in 1975, followed by Poirier in 1977 and Murphy in 1984. The events that gave rise to this lawsuit began in August 1990 when a fourth guard, John Crothers, was fired, according to Carolyn Wunsch, the personnel manager of the Wilmington plant, for a "breach of security." In September 1990, Crothers was replaced by a younger

woman, Phyllis Estepp. In October 1990, Crothers filed an EEOC charge alleging unlawful age and sex discrimination. He named the three plaintiffs as witnesses to his job performance during his employment with Georgia-Pacific.

On May 7, 1991, all three plaintiffs met with an EEOC investigator concerning Crothers' charge. They testified at trial that, despite Wunsch's request that they mislead the EEOC investigator about Crothers' performance and make statements favorable to the company, they made truthful statements to the investigator. On May 14, 1991, Wunsch informed the plaintiffs that Estepp was to be replaced by OSS Security, an outside security agency that would provide weekend security at the plant. The plaintiffs offered to give up their overtime on weekends to keep all four guards employed, but Wunsch refused their offer. Estepp was soon fired, and OSS began to provide the weekend security services. Estepp filed discrimination charges with the EEOC, claiming that she was unlawfully discharged on the basis of her sex.

In July 1991, Wunsch established a mandatory rotation for the plaintiffs' shifts and directed them not to swap their assigned hours. Prior to this change, the plaintiffs had worked out their own rotations, which permitted them to take account of family and personal obligations. Because of these changes in their working conditions, the plaintiffs filed their own charges with the EEOC in August 1991.

In October 1991, the plaintiffs invoked the company's "open door" policy, sending a letter outlining their complaints to Donald Glass, the Senior Vice President of the division, which was based in Atlanta. Glass forwarded the letter to Michael Vidan, the division's Vice President. In November 1991, Vidan wrote to the plaintiffs, informing them that James Hurd, the division's Corporate Personnel and Labor Relations Manager, would investigate their complaints and get back to them. The plaintiffs never heard anything further on the subject. Walden testified that she approached several plant officials about the plaintiffs' complaints over the next couple of months, but they refused to speak to her about them, informing her that they had been directed to stay out of the dispute. In February 1992, Hurd arrived from Atlanta and fired the plaintiffs.

Appendix A

The plaintiffs filed retaliation charges with the EEOC, contending that they had been wrongfully terminated for protected activity in violation of Title VII, 42 U.S.C. § 2000e-3(a)(1996).[1] After receiving a right to sue letter from the EEOC, the plaintiffs filed a complaint in the District Court for the District of Delaware.[2] The case was tried to a jury on one count of retaliatory discharge in December 1995.[3]

At trial, Georgia-Pacific introduced evidence that the plaintiffs were fired to effect large cost savings. Wunsch testified that she proposed contracting out the security services after the temporary employment of an outside agency during the 1990 Christmas season demonstrated its cost effectiveness. In February 1991, she, George Woodham, the Wilmington plant Production Superintendent, and Dave Watson, the division's Production Manager, raised the idea with Montgomery Palmowski, the Wilmington plant manager. Palmowski rejected the proposal to replace all the guards, but agreed to replace one of the guards with an outside service on weekends. According to Wunsch's testimony, Estepp was replaced because she was the least senior guard. Howard Schutte, the division's Operations Manager, testified that, in January 1992, he received a memorandum from Charles Terry, named interim Wilmington plant manager after Palmowski was fired, recommending that the entire guard unit be replaced to save costs. Based on this recommendation, Schutte decided to discharge the

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1. The plaintiffs' original complaint alleges that the defendants retaliated against the plaintiffs because they (1) cooperated with the EEOC in its investigation of the charges filed by Crothers and Estepp; (2) refused to lie to the EEOC to protect the company in the Crothers and Estepp investigations; and (3) filed complaints with the EEOC alleging retaliation for their participation in the Crothers and Estepp matters.

2. The plaintiffs initially named many Georgia-Pacific executives and managers as defendants. They voluntarily dismissed the claims against all the individual defendants except Virgil Gardner, the division's Manager of Industrial Relations and EEO Coordinator.

3. The district court granted summary judgment for the defendants on several of plaintiffs' claims—retaliation in failure to rehire, defamation against Gardner, and breach of contract—and hence only the retaliatory discharge claim went to the jury.

plaintiffs. According to Georgia-Pacific, the elimination of the plaintiffs' jobs was consistent with other cost-cutting measures employed in the division between 1990 and 1992.

The jury returned a verdict in Georgia-Pacific's favor. The plaintiffs filed a motion for a new trial, Fed. R. Civ. P. 59, which the district court denied. This appeal followed. The district court exercised subject matter jurisdiction under 28 U.S.C. § 1331, and we have appellate jurisdiction over its final order under 28 U.S.C. § 1291.

II. *The Jury Instruction: Did the Plaintiffs Introduce at Trial Sufficient "Direct" Evidence of Retaliatory Animus to Qualify for a Mixed Motives Instruction Under* Price Waterhouse v. Hopkins, *490 U.S. 228 (1989)?*

The district court, over the plaintiffs' objection, gave the jury a pretext charge. On appeal, the plaintiffs contend that they introduced at trial sufficient "direct" evidence of retaliatory animus to qualify for a mixed motives instruction under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).[4] In a mixed motives case, the evidence put forth

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4. The plaintiffs object to the jury instructions in several additional respects. First, they submit that the evidence shows that Georgia-Pacific failed to investigate the plaintiffs' October 1991 letter of complaint in accordance with the company's "open door" policy. Based on this evidence, they contend that the district court erred in failing to instruct the jury that Georgia-Pacific's act of "closing" the open door policy gave rise to a cause of action. The plaintiffs, however, did not properly plead this as a cause of action either in their complaint or pre-trial memorandum. Both documents plead only wrongful discharge as a cause of action, listing the closing of the open door policy as a piece of evidence that they would prove at trial to support their wrongful discharge theory. Alternatively, the plaintiffs contend that the district court erred in refusing to instruct the jury that the letter to Glass constituted protected activity. As a matter of law, this letter could not constitute protected activity. Rather, it was a general grievance about changes in working conditions, the perceived threat to the plaintiffs' job security, and the derogatory comments made by Virgil Gardner about them. It did not complain of any acts that are unlawful under Title VII. *See Barber v. CSX Distrib. Servs.*, 68 F.3d 694 (3d Cir. 1994). At all events, any error in this respect would be harmless. The plaintiffs were able to put on all of their evidence about the letter to Glass and the

by the plaintiff is so revealing of retaliatory animus that it is unnecessary to rely on the *McDonnell Douglas/Burdine* burden-shifting framework, under which the burden of proof remains with the plaintiff. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Rather, the burden of production *and* risk of nonpersuasion shift to the defendant, which must show that, even if retaliation was a motivating factor in the adverse employment decision, it would have made the same employment decision in the absence of retaliatory animus. *See Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994).[5] We generally review jury instructions for abuse of discretion, but our review is plenary when the question is whether the instruction misstates the law, *see Savarese v. Agriss*, 883 F.2d 1194, 1202 (3d Cir. 1989), as the plaintiffs here contend.

As we have explained in prior cases, whether a plaintiff has presented a pretext or a mixed motives case depends on the quality of the evidence that the plaintiff adduces in support of the claim of illegal discrimination. *See Wilson v. Susquehanna Township Police Dep't*, 55 F.3d 126 (3d Cir.

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subsequent investigation, or lack thereof, as evidence of the company's retaliation for protected activity. Moreover, plaintiffs' counsel was permitted to refer to the letter as protected activity in his closing argument to the jury.

Additionally, plaintiffs contend that, because the Civil Rights Act of 1991 governs their claim, the district court should have instructed the jury that it could find for the plaintiffs if unlawful retaliation was a "motivating factor" in the plaintiffs' discharge. Our decision in *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3d Cir. 1997), decided after the plaintiffs filed their brief in this appeal, forecloses this contention. Under *Woodson*, the "motivating factor" standard of § 107 of the 1991 Act does not apply to retaliation claims. *See id.* at 935.

5. The differences between the burden-shifting framework of pretext cases under *McDonnell Douglas* and *Burdine*, and mixed-motives cases under *Price Waterhouse* have been amply explained in prior cases, and we need not dwell on them here. *See, e.g., Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095-96 n.4 (3d Cir. 1995); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1224-25 (3d Cir. 1994).

1995); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995); *Armbruster*, 32 F.3d 768; *Hook v. Ernst & Young*, 28 F.3d 366 (3d Cir. 1994). Not all evidence that is probative of illegitimate motives suffices to entitle a plaintiff to a mixed-motives/*Price Waterhouse* charge. Rather, as Justice O'Connor explained in her *Price Waterhouse* concurrence, the employee must show "*direct evidence* that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) (emphasis added). In other words, the evidence must be such that it demonstrates that the "decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision." *Id.* at 277.

In point of fact, the term "direct evidence" is somewhat of a misnomer, for we have held that certain *circumstantial* evidence is sufficient for a mixed motives instruction, if that evidence can " 'fairly be said to directly reflect' the alleged unlawful basis" for the adverse employment decision. *Hook*, 28 F.3d at 374 (quoting *Griffiths v. CIGNA Corp.*, 988 F.2d 457, 470 (3d Cir. 1993), *overruled on other grounds*, *Miller v. Cigna Corp.*, 47 F.3d 586 (3d Cir. 1995)(en banc)). We have also repeatedly made clear that a plaintiff must clear a high hurdle to qualify for a mixed motives instruction: "The burden of persuasion shifts to the employer 'only after the plaintiff ha[s] proven that her employer acted unlawfully,' and not merely 'on the basis of a prima facie showing.' " *Hook*, 28 F.3d at 374 (quoting *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192 n.1 (2d Cir. 1991)). Put differently, a mixed motives instruction is warranted only when the "evidence is sufficient to permit the factfinder to infer that [a discriminatory] attitude was more likely than not a motivating factor in the employer's decision." *Griffiths*, 988 F.2d at 470.

Justice O'Connor shed light on what constitutes such "direct" evidence as follows:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the

decisional process itself, suffice to satisfy the plaintiffs' burden in this regard.

Price Waterhouse, 490 U.S. at 277 (internal citations omitted). This is borne out in *Armbruster*, *supra*, an ADEA case. There the plaintiffs introduced age-related comments by a Unisys Vice-President, Robert Markell. Markell had resigned at least three months before the adverse employment actions at issue, but several months before he resigned. Markell allegedly stated that Unisys could not "afford to keep people over 50 and 50," meaning those over 50 years of age who were earning over $50,000 a year. Yet we held that not even this statement was sufficient direct evidence to require a mixed motives charge.

Markell had testified that he had no connection with the challenged employment decision, although in his capacity as Vice President he was often involved in hiring and firing decisions. We concluded that "Markell's alleged statement is not attributable to a decisionmaker connected with the . . . employment decisions and is too remote in time . . . to constitute overt evidence sufficient to show Unisys had a discriminatory animus towards older employees." *Armbruster*, 32 F.3d at 779. Thus, statements that are unconnected to the decision at issue, even if made by people who hold positions of authority with the employer, are not direct evidence of unlawful discharge.

The plaintiffs point to several pieces of evidence that they contend, taken together, constitute sufficient direct evidence to entitle them to a mixed motives charge. First, they point to testimony that, in December 1990, plaintiff Walden was subpoenaed as a witness in an arbitration hearing for Raymond Gottshall, a fired union employee. At the time of that hearing, Virgil Gardner, the division's Manager of Industrial Relations and EEO Coordinator, told Gottshall that "you should leave people out of this, especially people that aren't in the union because they will lose their job over it." Gottshall told Walden about Gardner's threat, but she nevertheless decided to testify. Wilmington Plant Manager Palmowski, also present at the hearing, testified that Gardner asked him "What the hell is she doing here?" Palmowski testified that "[h]e was very

upset. She was a non-union hourly employee at a union employee arbitration."

Second, the plaintiffs point to a July 11, 1991, memorandum from Gardner to Division Vice-President Vidan. In that memorandum, Gardner related the details of the EEOC charge filed by Phyllis Estepp. In the final paragraph, he recommended that the company seriously consider contracting out all of the security work. He wrote: "My personal terminology is that we used the Security Guard positions as a home for the sick, lame, and lazy. Their loyalties do not rest with the Company's best interests." The memorandum shows that copies were forwarded to Labor Relations Manager Hurd, Division Operations Manager Schutte, and Plant Manager Palmowski.

Third, the plaintiffs introduced evidence that, in late September or early October 1991, Georgia-Pacific received notice of the plaintiffs' August EEOC charge. Palmowski testified that Division Production Manager Watson telephoned him and "was upset" about the charge. Watson told Palmowski that "we can't have bullshit like this" and also that "we have to end this situation now. It's gone too far."

The plaintiffs' fourth piece of evidence stems from Palmowski's response to Watson's call. After the call, Palmowski confronted plaintiffs Walden and Poirier, informed them that Atlanta was upset, and urged them to consider withdrawing the EEOC charge because "the timing was absolutely poor." Palmowski testified that "I was being pressured to eliminate their jobs, and I didn't want to."

Finally, the plaintiffs point to evidence that the company's open door policy was "closed." The plaintiffs submit that the evidence shows that the company, and in particular James Hurd, failed to investigate their complaints contained in the letter to Division Senior Vice-President Donald Glass in accordance with the open door policy.

Georgia-Pacific contends that the forgoing evidence does not demonstrate sufficient retaliatory animus by persons actually connected to the decision to replace the plaintiffs

to constitute "direct evidence" under *Price Waterhouse*, and hence that the district court properly gave the jury a pretext charge. Moreover, Division Operations Manager Schutte testified that he alone made the decision to terminate the plaintiffs, based on Wilmington Interim Plant Manager Terry's recommendation. Plaintiffs' counsel acknowledged as much in his closing argument when he referred to Schutte as the "sole decisionmaker." As such, according to Georgia-Pacific, none of the evidence put forth by the plaintiffs directly reflects retaliatory animus on the part of those involved in the decision to fire the plaintiffs because there was no evidence at trial that Schutte or Terry made any statements or engaged in any conduct that reflected a retaliatory motive (nor do the plaintiffs' briefs point to any such evidence).

The plaintiffs rejoin that all of the above-mentioned Georgia-Pacific personnel *were* somehow involved in the decision to replace the plaintiffs. They contend that "[r]eality dictates that those who have direct access to the decisionmakers and are likely to influence their decision should be considered persons in the 'decisionmaking process.'" Thus, even though Schutte testified that it was only he who made the decision to fire the plaintiffs, the plaintiffs urge us to take a broader view of who qualifies as a decisionmaker. They submit that, in determining the direct evidence question, we should consider statements and conduct of other Georgia-Pacific employees if those employees had access to or were likely to influence Schutte's decision. The plaintiffs in effect argue that the evidence shows that the entire chain of command was infected with retaliatory animus, and that we should assume that statements by other Georgia-Pacific managers influenced Schutte's decision.

We agree with the plaintiffs that the fact that they acknowledged that Schutte was the sole decisionmaker does not foreclose the *Price Waterhouse* determination. Indeed, there is much to support a conclusion that many Georgia-Pacific managers recommended and approved of replacing the plaintiffs with the outside guard service. Schutte testified that the idea to replace the guards was initially proposed by Wilmington Personnel Manager

Wunsch and Wilmington Plant Production Superintendent George Woodham in February or March 1991. And EEO Coordinator Gardner, in the July 1991 memorandum to Hurd, recommended replacing the guards with an outside security service. Nevertheless, that evidence cannot constitute direct evidence if it was not linked to Schutte's specific decision to fire the plaintiffs because we could not say that it *directly* reflects retaliatory animus on the part of the decisionmakers. *See Hook*, 28 F.3d at 374.

Taking each piece of evidence separately, we turn first to the comments that Gardner is alleged to have made at the Gottshall arbitration. That arbitration occurred in December 1990, long before the plaintiffs engaged in their first protected activity — meeting with the EEOC investigator in May 1991. Hence, the statements were not only remote in time from the decision to fire the plaintiffs over a year later, but they cannot constitute direct evidence that the plaintiffs were replaced in retaliation for protected activity because they were made *before* that activity.

Second, as to Palmowski's warning to the plaintiffs that the company was upset about the EEOC charge, Palmowski was discharged several months before the plaintiffs were themselves fired, and therefore, could not have been involved in Schutte's termination decision, even though as plant manager he had the authority to fire the guards. Moreover, there is no evidence suggesting that Palmowski ever recommended that the plaintiffs be replaced. In fact, there is significant evidence that Palmowski worked to save the plaintiffs' jobs. The plaintiffs respond that Palmowski's statements reflected the retaliatory animus of the Georgia-Pacific managers who actually participated in the decision to fire them. But Palmowski's statement is vague and unconnected to any specific participant in the decision to replace the plaintiffs. As such, it could not constitute evidence that directly reflects retaliatory animus on the part of the decisionmakers.

Similarly, the evidence presented by the plaintiffs that the company, and in particular Labor Relations Manager Hurd, shut down the open door policy also is not sufficient to require a mixed motives charge. As the human resources director for the entire division, Hurd himself was not in the

direct chain of command over the plaintiffs, and there is no evidence that he was involved in the decision to replace the plaintiffs with the outside guard service in any way. Moreover, this evidence, even if probative of retaliatory motive, is circumstantial evidence that does not rise to the level of evidence that "directly" reflects retaliatory animus.

We turn next to Division Production Manager Watson's comments to Palmowski ("we can't have bullshit like this." and "we have to end this situation now. It's gone too far.") after he learned of the plaintiffs' EEOC charge. Watson was in the direct chain of command involved in the decision to fire the plaintiffs — Schutte was his supervisor and he directly supervised the Wilmington plant manager (Palmowski and then Terry). Although he was in the direct chain of command, however, there is no evidence that he was involved in the decision to fire the plaintiffs, i.e. there is no evidence that he recommended the replacement of the plaintiffs or that he influenced Schutte's decision. His comments were also made several months before the plaintiffs were fired. Therefore, although Watson's comments are quite probative of retaliatory animus, it would be pure speculation to conclude that Schutte acted on the basis of Watson's advice. As *Armbruster* shows, statements even by decisionmakers cannot constitute direct evidence if there is no evidence somehow linking that person to the actual decision. Under such circumstances, we could not say that Watson's statements directly reflect retaliatory animus on the part of those involved in the decision.

We are left with Gardner's memorandum of July 1991 to Division Vice-President Vidan recommending that the guards be replaced, in which Gardner wrote that the plaintiffs' "loyalties do not rest with the Company's best interests." The memorandum shows that the decisionmaker, Schutte, was sent a copy of it. Despite the connection to Schutte, however, we conclude that the memorandum also does not constitute direct evidence. It was written more than six months before the plaintiffs were fired, and there is no evidence linking Gardner to the February 1992 decision to fire the plaintiffs. Even though Schutte presumably received a copy of the memo, the fact

that a decisionmaker received a memorandum containing a statement that allegedly reflects retaliatory animus does not show that the decisionmaker shared that retaliatory animus.

But even if the connection between Gardner's memorandum and Schutte's decision was closer, the statement in Gardner's memo does not constitute "direct evidence." Although probative of retaliatory animus, we find that the statement does not rise to the high level required of direct evidence, as it does not show that Georgia-Pacific acted unlawfully in firing the plaintiffs in February 1992. Gardner's statement that the plaintiffs' "loyalties do not rest with the Company's best interests" is vague and not specifically connected to any protected activity engaged in by the plaintiffs, i.e. speaking truthfully to the EEOC investigator in May 1991. In other words, the statement does not demonstrate that retaliation was more likely than not the motivating factor in the decision to replace the plaintiffs with the outside guard service, as our case law requires. *See Griffiths*, 988 F.2d at 470.

In sum, we conclude that the district court did not err in charging the jury with a pretext instruction because the plaintiffs did not produce sufficient "direct" evidence of retaliatory animus to require a mixed motives burden shifting charge.

III. *Did the District Court Err in Excluding the Statements by Woodham and Fuller Allegedly Reflecting a Retaliation Animus?*

The plaintiffs next contend that the district court erred in excluding from evidence, on relevancy grounds, statements allegedly made by George Woodham, the Wilmington plant Production Superintendent, and Robert Fuller, the Wilmington plant Warehouse Superintendent, to the plaintiffs. In September 1991, after the plaintiffs filed their EEOC charge, Woodham allegedly said to Walden, in the presence of Poirier:

> [Y]ou should all be fired, you were disloyal to the company . . . . [I] should have fired all of [you] when [we] got rid of Estepp, she was a trouble maker too.

Appendix A

In August 1991, Fuller allegedly told the plaintiffs:

> If [I] was [your] boss [you] would all be fired. I'd bring the agency guards in here so fast your head would spin! You are disloyal to the company. They pay you, you should be loyal to them. You would all be fired, if I was your boss.

The district court's ruling to exclude the statements was made pre-trial at an *in limine* hearing, and the plaintiffs failed to make an offer of proof at trial. Given the applicable standard of review, we reject the plaintiffs' challenge.[6]

A. Was the District Court's Exclusionary Pretrial Evidentiary Ruling Insufficiently Final that the Plaintiffs Waived Their Right to Appeal the Ruling by Failing to Make an Offer of Proof at Trial, So that We Review for Plain Error?

An *in limine* pretrial evidentiary hearing serves many useful purposes. *See generally United States v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985); *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 859 (3d Cir. 1990) ("*Paoli I*"); *Manual for Complex Litigation, Third* § 21.642 (1985). When

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6. We also reject three of the plaintiffs' other evidentiary challenges. First, the district court did not err in excluding as irrelevant the statement from the "Thoughts for the Day" column of the company's 1984 EEO newsletter that "People who mind their own business will never be unemployed." The statement was written eight years before the plaintiffs lost their jobs, and was therefore too remote in time to be of probative value. Additionally, the statement is vague and does not clearly reflect a company policy of retaliating against "troublemakers," as the plaintiffs suggest.

Second, the plaintiffs contend that the district court erred in excluding evidence that the quality of the guard services provided by OSS was poor, which the plaintiffs submit was relevant to proving that the company's asserted reason for firing the plaintiffs—cost savings—was pretextual. We disagree. The evidence that OSS' performance was lacking does nothing to discredit the evidence that the company saved a significant amount of money by contracting out the security jobs. Finally, the district court did not abuse its discretion in excluding evidence that the company properly handled the open door policy complaints of two other employees.

a definitive evidentiary ruling is made pretrial, there is surely no point to taking the time at trial to make an objection if the *in limine* ruling admitted certain evidence, or to make an offer of proof if the *in limine* ruling excluded it. On the other hand, if the *in limine* ruling is only tentative, which is how the district court described its rulings here, then it is preferable that a definitive ruling be made in the context of a fuller (trial) record.

We are hard pressed to see the advantages of an *in limine* hearing that only produces tentative rulings. The game would hardly be worth the candle. But that is what we are faced with here, hence we deal with it. The key question is whether the *in limine* ruling excluding the Woodham and Fuller statements was sufficiently final that the plaintiffs' failure to make an offer of proof at trial operates to render the standard of review here abuse of discretion rather than plain error.

Although decisions to exclude evidence are generally reviewed for abuse of discretion, *see, e.g., Barker v. Deere & Co.*, 60 F.3d 158, 161 (3d Cir. 1995), when a party fails to preserve the right to appeal an exclusion, we review for plain error. Under Fed. R. Evid. 103(a), a party may not appeal a ruling excluding evidence unless the party asserting error made an offer of proof at trial.[7] Georgia-Pacific points out that the district court expressly stated that its *in limine* rulings were "tentative," and contends that, by failing to attempt to introduce the Woodham and Fuller statements at trial, the plaintiffs waived their right to appeal the ruling under Rule 103 so that our review is subject to a plain error standard. The plaintiffs respond that the district court made comments at that hearing that suggested that the rulings were final, and thus, under

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7. Fed. R. Evid. 103(a) reads:

> **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . .
>
> **(2) Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

these circumstances, their opposition to Georgia-Pacific's motion *in limine* was a sufficient offer of proof under Rule 103(a).

In *American Home Assurance Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985), we dealt with the question whether a party must formally object at trial to the admission of evidence in cases where the district court had previously denied that party's pre-trial motion to exclude that evidence. We rejected Sunshine's contention that American Home had waived its right to appeal the admission of the evidence when it failed to object at trial, reading Fed. R. Evid. 103(a) in conjunction with Fed. R. Civ. P. 46, which makes formal objections unnecessary.[8] We reasoned:

> Here, counsel for American Home filed a written pretrial motion requesting that the evidence . . . be ruled inadmissible. The motion set forth reasons, including case citations, in support of the request. The trial court held a hearing at which it considered the arguments of counsel and made a definitive oral ruling with no suggestion that it would reconsider the matter at trial. Under these circumstances, requiring an objection when the evidence was introduced at trial would have been in the nature of a formal exception and, thus, unnecessary under Rule 46.

753 F.2d at 324-25; *see also Government of the Virgin Islands v. Joseph*, 964 F.2d 1380, 1384 (3d Cir. 1992); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 767-68 (3d Cir. 1989).

Therefore, if a party files an unsuccessful motion *in*

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8. Fed. R. Civ. P. 46 reads:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

limine seeking the exclusion of certain evidence, that party need not formally object at trial when the evidence in question is introduced if two conditions are satisfied: (1) the party filed a written pre-trial motion setting forth reasons and case citations in support of the request that the evidence be excluded; and (2) the district court made a "definitive" ruling with no suggestion that it would reconsider the matter at trial.

American Home presented the obverse of the case at bar: American Home sought to have certain evidence excluded, and then failed to object to the introduction of that evidence. In contrast, the plaintiffs here *opposed* Georgia-Pacific's motion *in limine* to exclude certain evidence and then failed to make an offer of proof at trial. Despite this difference, we see no reason why the *American Home* rule should not apply to this case.[9] In both instances, the same concern for efficiency motivates our decision to dispense with formal objections and offers of proof at trial following a final ruling on a motion *in limine*. As we explained in *American Home*, "If an issue is fully briefed and the trial court is able to make a definitive ruling, then the motion *in limine* provides a useful tool for eliminating unnecessary trial interruptions." *American Home*, 753 F.2d at 324.

These efficiency concerns are, of course, predicated on

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9. We acknowledge that it is generally easier for a party who seeks to exclude evidence to object at trial than it is for a party who seeks to admit evidence to make an offer of proof. As the First Circuit has observed, "To require that the evidence be offered again at trial would certainly give the trial court a second chance, but doing so can hardly be described as easy: on the contrary, the proponent would have to engage in the wasteful and inconvenient task of summoning witnesses or organizing demonstrative evidence that the proponent has already been told not to offer." *Fusco v. General Motors Corp.*, 11 F.3d 259, 262 (1st Cir. 1993). We note however that a proffer in this case, at least of Woodham's statement, would not have been difficult. Woodham testified at trial and was the subject of extensive cross-examination. At all events, despite the difficulties that may be involved in proffers of evidence in some cases, we find that the benefits, described *infra* at n. 10, outweigh any burdens that such proffers might place on the proponents of evidence when the district court has made only a tentative pretrial ruling.

the district court's actually making a final decision before trial. If the district court makes only a tentative ruling on a motion *in limine* an objection or offer of proof at trial is not unnecessary or "formal." Rather, there are separate interests, noted in the margin, that are promoted by requiring the unsuccessful party to make an objection or offer of proof at trial.[10]

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10. First, motions *in limine* often present issues for which final decision is best reserved for a specific trial situation. *American Home*, 753 F.2d at 324; *cf. Luce v. United States*, 469 U.S. 38, 41-42 (1984) (holding that criminal defendant must testify to preserve claim of improper impeachment with prior conviction) ("The [*in limine*] ruling is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling."). This is particularly true when the evidence is challenged as irrelevant or prejudicial; the considerations weighed by the court will likely change as the trial progresses. *See Rosenfeld v. Basquiat*, 78 F.3d 84, 91 (2d Cir. 1996) ("Unlike rulings that involve balancing potential prejudice against probative value, the ruling in the present case was not fact-bound and no real purpose other than form would have been served by a later objection.").

We have also made clear that rulings excluding evidence on Rule 403 grounds should rarely be made *in limine*. "[A] court cannot fairly ascertain the potential relevance of evidence for Rule 403 purposes until it has a full record relevant to the putatively objectionable evidence. We believe that Rule 403 is a trial-oriented rule. Precipitous Rule 403 determinations, before the challenging party has had an opportunity to develop the record, are therefore unfair and improper." *Paoli I*, 916 F.2d at 859; *see also In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 747 (3d Cir. 1994) ("*Paoli II*"). Under these and similar circumstances, if a district court makes a tentative pre-trial ruling, it has the opportunity to "reconsider [its] in limine ruling with the benefit of having been witness to the unfolding events at trial." *United States v. Graves*, 5 F.3d 1546, 1552 (5th Cir. 1993).

Second, requiring an objection or offer of proof at trial when a district court has made only a tentative ruling permits the appellate court to undertake a more meaningful review of the evidentiary ruling at issue. Appellate review of a tentative ruling based only on a hypothetical pretrial offer of proof is much more difficult than when that offer of proof is made in a concrete factual context at trial. As the First Circuit has observed in a case in which there was no trial objection, "it is precisely

Thus, a party who unsuccessfully opposes an *in limine* motion to exclude certain evidence can appeal that ruling without an offer of proof at trial if the district court was fully informed and made a pretrial ruling with no suggestion that it would reconsider that ruling at trial. Concomitantly, where a district court makes a *tentative in limine* ruling excluding evidence, the exclusion of that evidence may only be challenged on appeal if the aggrieved party attempts to offer such evidence at trial.

The critical question before us, then, is whether the district court's *in limine* ruling to exclude the Woodham and Fuller statements was "a definitive . . . ruling with no suggestion that it would reconsider the matter at trial." *American Home*, 753 F.2d at 325.[11] Georgia-Pacific submits that the plaintiffs cannot make this showing because the district court expressly stated at the opening of the hearing that its rulings were tentative:

> I want to be helpful, and maybe I'm not going to be helpful. I'm going to make some tentative rulings on what I read in the briefing, and then we will go from there, and to have some refinement. I want this trial to go as smoothly with the jury as possible. I will make these tentative rulings with what I have in the briefing, and then we will see where we are as we begin with the different aspects of the case.

In response, the plaintiffs point to a colloquy that occurred after the court made all of its rulings. When the plaintiffs' counsel challenged the court's ruling excluding a statement in the company's 1984 EEO newsletter, the court responded:

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because appellant comes before us not having attempted to offer evidence during the trial that we cannot rule intelligently on the underlying evidentiary questions; he presents us with an abstract intellectual exercise, rife with conjecture, rather than affording us an opportunity to inspect concrete evidence, offered and excluded in an actual trial context." *United States v. Holmquist*, 36 F.3d 154, 164 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995).

11. Georgia-Pacific does not dispute that the parties' pretrial papers satisfactorily briefed the district court on the evidentiary issues.

THE COURT: Let me just tell you something, Mr. Kuroishi, so we can get along real well. You are going to have to accept the rulings of the Court and get along. I'm trying to tailor my rulings to the relevant issues in this case. You folks are all over the board.

You have a claim of retaliation as properly alleged and you have three plaintiffs. I am trying to get evidence that relates to the, and things that might otherwise indicate a corporate animus. You are going to lose some and you are going to win some. If I'm wrong, you will get me reversed. If I'm right, I will get affirmed. I'm not concerned about that. I'm trying to make rulings in time and germane to the issue we're trying. Don't reargue each one. We will be here much longer than is appropriate for this kind of a case.

MR. KUROISHI: Your Honor, the only concern I have is many times on appeal the Third Circuit will say, You didn't say anything at the time.

THE COURT: All they have to do is look at your brief, and you have every case in there. You analyze, reanalyze cases. I have tried to address them in terms of rulings in the context of the facts of this case. You have all those papers in the record. You don't have to reargue them with me.

Of course, when an objection is granted or overruled, there is no exception any more in the Federal System, so it's on the record. We want to get to the facts of this case.

We are sympathetic to the plaintiffs' argument that, based on this colloquy, counsel believed that the district court's rulings, despite the court's initial description of them as tentative, were in fact final. Several aspects of the court's admonition to plaintiffs' counsel suggest that the plaintiffs could obtain relief from the rulings only through appellate review. Moreover, the court's comments may have suggested that plaintiffs' counsel had already preserved his objections for appeal.

Nevertheless, under *American Home*, a party is only excused from an offer of proof at trial if the district court's

in limine ruling was definitive with no suggestion that the court would reconsider the ruling. The district court clearly stated at the outset of the hearing that its rulings were tentative and that it would reconsider those rulings at trial, and the court never retreated from that position. Although the district court told plaintiffs' counsel not to reargue every ruling, it did not countermand its clear opening statement that all of its rulings were tentative, and counsel never requested clarification, as he might have done. Moreover, and tellingly, plaintiffs' counsel attempted to introduce at trial other evidence that was excluded at the *in limine* hearing, which suggests that he understood the court's protocols.[12]

Finally, we note that the court's admonition, which forms the basis of plaintiffs' requested reprieve, was made after the court ruled on the Woodham and Fuller statements, and addressed only the decision to exclude the 1984 EEO newsletter. This undermines plaintiffs' blanket contention. Additionally, it is clear to us that plaintiffs' able and resolute counsel was never cowed by his colloquy with the district court. We hold that under these circumstances, an offer of proof at trial would not have been merely "formal" and that the plaintiffs were required to make one. As they failed to do so, we will review the district court's decision to exclude the Woodham and Fuller statements only for plain error.

B. Did the District Court Plainly Err in Excluding the Statements?

The basis for our review of the statements at issue is Fed. R. Evid. 103(d), which permits us to take notice of "plain errors affecting substantial rights." The Advisory Committee notes to Rule 103(d) indicate that the wording of the rule is taken from Rule 52(b) of the Federal Rules of Criminal Procedure. Accordingly, we have taken guidance on our

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12. More specifically, while at the *in limine* hearing, the court excluded employee petitions complaining of the poor quality of the OSS guards under Rule 401, at trial, during Walden's testimony, plaintiffs' counsel attempted to inquire about the poor performance of those guards. An objection was made and sustained.

construction of the civil plain error standard from the Supreme Court's interpretation of the criminal standard. *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995).

In *United States v. Olano*, 507 U.S. 725, 732-34 (1993), the Court set forth three requirements for a plain error challenge to succeed. First, there must be an actual error — a deviation from or violation of a legal rule. Second, the error must be plain; that is, the error must be clear and obvious under current law. Finally, the error must affect substantial rights. In other words, the error must be prejudicial and must have affected the outcome of the district court proceedings. *See also* Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5043 (1996)(error must produce "substantial injustice" denying the appellant a fair trial).

It has been our practice to exercise our power to reverse for plain error sparingly. *Chemical Lehman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 994 (3d Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 485, 136 L.Ed.2d 379(1996). A finding of plain error is only appropriate in the civil context when the error is so serious and flagrant that it goes to the very integrity of the trial. *Fashauer*, 57 F.3d at 1289 (citing *United States v. Carson*, 52 F.3d 1173, 1188 (2d Cir. 1995), *cert. denied* ___ U.S. ___, 116 S.Ct. 934, 133 L.Ed.2d 861 (1996)). It is this high standard which we will apply to the plaintiffs' claim.

The question before us is whether it was plain error for the District Court to exclude the Woodham and Fuller statements.[13] That is, was it error to exclude statements for the reason that they were made by individuals "outside the

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13. The plaintiffs contend that if the district court had properly admitted these statements, they would have constituted sufficient direct evidence of retaliation to require a mixed motives charge. But, like the statements we discussed in section II *supra*, these statements do not directly reflect retaliatory animus on the part of persons connected to the decision to fire the plaintiffs. There is no evidence linking Fuller to that decision. And although Woodham recommended replacing the guards, he made that recommendation months before the plaintiffs first engaged in any protected activity.

chain of decision-makers who had the authority to hire and fire" the plaintiffs, *Gomez v. Allegheny Health Serv., Inc.*, 71 F.3d 1079, 1085 (3d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2524, 135 L.Ed.2d 1049 (1996), when those statements constituted evidence of an atmosphere of retaliatory animus?

Our cases distinguish between discriminatory comments made by individuals within and those by individuals outside the chain of decisionmakers who have the authority to discharge. We have generally held that comments by those individuals outside of the decisionmaking chain are stray remarks, which, standing alone, are inadequate to support an inference of discrimination. *See id.* at 1085; *see also Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 546 (3d Cir. 1992)(arguing that to allow a series of stray remarks over a five year period to suffice to prove discriminatory motive would be to overstep the limits of Title VII).

The statements made by Woodham and Fuller in the present case fall within the category of stray remarks by non-decisionmakers. Although both worked at the Wilmington plant in a supervisory capacity, neither supervised the plaintiffs. Furthermore, neither Woodham or Fuller participated in the decision to discharge the plaintiffs, nor did they have the authority to order the plaintiffs' termination. Finally, it is also worthy of note that the statements at issue were somewhat remote in time from the decision to fire the plaintiffs (the statements occurred in August 1991, and the plaintiffs were terminated in February 1992) and, in fact, Woodham was transferred from the Wilmington facility months before the termination decision.

Although stray remarks by non-decisionmakers alone are insufficient to establish discriminatory intent, we have held that such remarks can still constitute evidence of the atmosphere in which the employment decision was carried out, and therefore can be relevant to the question of retaliation. *See Woodson*, 109 F.3d at 922; *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 1996). Such evidence "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an

unlawful motive." *Antol*, 82 F.3d at 1302 (quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)); *see also Ezold*, 983 F.2d at 546 (evidence of discriminatory atmosphere may be relevant because it tends "to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff"). Accordingly, stray remarks by non-decisionmakers may be properly used by litigants as circumstantial evidence of discrimination. *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995).

Although stray remarks by non-decisionmakers may be relevant to proving retaliation, we have never held that such remarks are at all times admissible. Rather, the district court retains its normal discretion to exclude such evidence under general relevancy principles. *See* Fed. R. Evid. 401. Of course, the district court must also keep in mind the import of our prior case law, noted *supra*, that stray remarks are not categorically excludable even though not directly connected to the particular employment decision at issue.

In the present case, the district court apparently made just such a blanket exclusion of the Woodham and Fuller statements. The court found the statements to be "general and unrelated" to the issue of retaliation, which the court considered to be the "specific issue" of the case. Although it is unclear from the record, this finding was presumably based on the fact that Woodham and Fuller never directly supervised the plaintiffs, and the fact that Woodham was transferred from the Wilmington plant months before the plaintiffs were fired. Because it is clear, however, that stray remarks by non-decisionmakers may be relevant to the question whether the plaintiffs were fired in retaliation for protected activity, these facts in and of themselves are not sufficient to deem the Woodham and Fuller statements irrelevant. It is apparent that the district court erred in its categorical exclusion of the Woodham and Fuller statements.

Our analysis does not end here, however. As noted, *supra*, to satisfy the plain error standard, the error not only must be clear and obvious under current law, but also must affect a substantial right. To reiterate, this means

that the error must have affected the outcome of the trial proceedings in a manner that threatens "substantial injustice." The court's error in excluding the Woodham and Fuller statements does not reach this threshold.

Although the stray remarks at issue could have provided additional circumstantial evidence of the defendant's discriminatory animus, the jury was presented with other significant evidence of the defendant's possible bias against "troublemakers" (i.e. those workers who engage in legally protected activities to enforce their rights) in its organization, and yet still found for Georgia-Pacific. This evidence included statements reflecting a similar animus by Palmowski and Watson, both of whom were in the plaintiffs' chain of command, as well as additional statements by Virgil Gardner, the company's EEO coordinator.[14] The plaintiffs introduced, for example, Gardner's memorandum labeling the plaintiffs as "sick, lame and lazy. . . [whose] loyalties do not rest with the company's best interests." Additionally, Gardner's statements designed to deter plaintiff Walden from being a witness at Gottshall's union arbitration hearing were placed before the jury.

On this record, we cannot conclude that the outcome of the trial would have been different had the jury heard the Woodham and Fuller statements, nor can we conclude that the error threatened the very integrity of the trial. Accordingly, we hold that the district court's exclusion of the Woodham and Fuller statements did not amount to plain error.

IV. *Impeachment of a Corporate Employee with a Conviction of the Corporation under Rule 609*

The plaintiffs next contend that the district court erred in excluding evidence of Georgia-Pacific's 1991 plea of guilty to tax evasion charges based on a fraudulent appraisal of

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14. Palmowski testified, for example, that upon hearing of the plaintiffs' EEOC charges, Watson told him "we have to end this situation now. It's gone too far." In addition, the jury heard that Palmowski admitted to Phyllis Estepp that she had been laid off because of the EEOC charge filed by her predecessor, John Crothers.

land in Florida in 1984. The plaintiffs sought to introduce this evidence under Fed. R. Evid. 609 to impeach the testimony of individual Georgia-Pacific employee witnesses, none of whom were shown to have any connection to the acts underlying the corporate conviction. The district court excluded the evidence under Fed. R. Evid. 403, finding that introduction of the evidence would be unduly prejudicial. The plaintiffs contend on appeal that use of this conviction falls under the "automatic" admission provision of Fed. R. Evid. 609(a)(2), and is therefore not subject to a Rule 403 analysis. Our review of the exclusion is plenary, as the construction of Rule 609 is an issue of law. *See United States v. Pelullo*, 964 F.2d 193, 199 (3d Cir. 1992).

Fed. R. Evid. 609, as amended in 1990, provides in relevant part:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Thus, if the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value. *See Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992); *United States v. Wong*, 703 F.2d 65, 68 (3d Cir. 1983). Because Rule 609(a)(2) does not permit the district court to engage in balancing, we have held that Rule 609(a)(2) must be construed narrowly to apply only to those crimes that bear on a witness' propensity to testify truthfully. *See Cree*, 969 F.2d at 37.

We assume arguendo that Georgia-Pacific's conviction for tax evasion falls within the ambit of 609(a)(2). The real question before us is whether prior convictions of a

corporation are admissible under Rule 609 generally to impeach the testimony of individual employee witnesses without any evidence that those witnesses participated in the conduct underlying the conviction. This is a question of first impression in this circuit, and so we write on tabula rasa.

Rule 609 is premised on "the common sense proposition that one who has transgressed society's norms by committing a felony is less likely than most to be deterred from lying under oath." *Cummings v. Malone*, 995 F.2d 817, 826 (8th Cir. 1993) (citing *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987)). Rule 609 evidence is admitted in order to inform the jury about the character of the witnesses whose testimony the jury is asked to believe. *See United States v. Martinez*, 555 F.2d 1273, 1275 (5th Cir. 1977). The automatic admission provision of Rule 609(a)(2) expresses the idea that some individuals who are found to have been dishonest in other contexts are presumed to be more prone to perjury than others. *See* Conf. Rep. No. 1597, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7051, 7098, 7103.

We have held that admissibility under Rule 609(a)(2) turns on whether the evidence of the crime bears on the witness's "propensity for falsehood, deceit, or deception." *Cree*, 969 F.2d at 38. It is only the testifying witness' own convictions that will bear directly on the likelihood that he or she will testify truthfully. *See United States v. Hayes*, 553 F.2d 824, 827 (2d Cir. 1977). Accordingly, it is axiomatic that it is only the testifying witness' own prior convictions that should be admissible on cross-examination to impeach his credibility. *See United States v. Austin*, 786 F.2d 986, 992 (10th Cir. 1986). Thus, for the plaintiffs' position to be correct, the 1991 Georgia-Pacific conviction must be the individual employee's "own" in some meaningful fashion.

We believe that this cannot be the case. Criminal acts are relevant to a witness' credibility only if that witness actually participated in the criminal conduct.[15] It strains logic to

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15. The plaintiffs contend in their reply brief that the Supreme Court's pre-Rules decision in *United States v. Trenton Potteries Co.*, 273 U.S. 392

argue that an employee's credibility is properly brought into question by the mere fact that he or she is presently employed by a corporation that in some unrelated manner was guilty of dishonest acts, no matter how egregious those acts may have been. There is no evidence that the individual witnesses who testified at trial had any involvement with Georgia-Pacific's tax evasion scheme, and thus that scheme could not possibly bear on the likelihood that those witnesses would testify truthfully.[16]

(1927), stands for the proposition that corporate convictions are admissible to demonstrate the bias of the employee witness. They cite the Court's holding that a corporate employee could be cross-examined on prior corporate convictions if admissibility of the evidence was "urged on the ground that it was directed to the bias of the witness, or that it was preliminary to showing his implication in the supposed offense, and thus affecting his credibility." *Id.* at 404-05 (internal citations omitted). Aside from the fact that this case was decided decades before Rule 609 was enacted, we believe that *Trenton Potteries* stands squarely for the proposition that the witness must be implicated in the corporate conviction in order for evidence of the conviction to be proper impeachment material. This is clear from the Court's language: the corporate conviction is relevant if it is "preliminary" to demonstrating the witness' own implication in the offense. While *Trenton Potteries* also suggests that the corporate conviction could be used to demonstrate that the witness is biased, such a bias inquiry is irrelevant to our consideration under Rule 609(a)(2). That is, the question presently at issue is whether the corporate conviction bears on the individual witness's propensity to commit perjury *as a convicted felon*, not whether the existence of the conviction somehow would bias the individual employee witness toward the corporation.

16. The only reported decision since the adoption of the Federal Rules of Evidence to address this question, *CGM Contractors, Inc. v. Contractors Environmental Services, Inc.*, 383 S.E.2d 861 (W. Va. 1989), arose under the West Virginia Rules of Evidence. Based on those rules (which are identical to the federal rules in pertinent part), the West Virginia Supreme Court of Appeals held that a corporate conviction is admissible against a witness only if the witness "held a managerial position at the time the crime occurred such that it may be fairly inferred that he shared responsibility for the criminal act, or have actually participated in the criminal act." 383 S.E.2d 866. Although we need not announce a similar rule to resolve the present case, our reasoning and that of the West Virginia court are consistent, and we believe that the *ratio decidendi* of the West Virginia court is sensible in light of the policies upon which Rule 609 is based.

Plaintiffs contend that the mandatory nature of Rule 609(a)(2) precludes the district court from exercising any discretion over the admissibility of the Georgia-Pacific convictions. While the plaintiffs are correct that the district court would be precluded from exercising its Rule 403 balancing discretion if the evidence was properly within Rule 609(a)(2), the district court is not precluded from determining whether the prior corporate conviction falls within the ambit of Rule 609 at all. Only if the witness is directly connected to a prior conviction for a crime involving dishonesty or a false statement does Rule 609(a)(2)'s automatic admission provision apply. To allow Rule 609(a)(2) to apply otherwise would be to "override the fundamental purpose of impeachment evidence, namely, to expose a defect in the witness's credibility." Glen Weissenberger, *Federal Rules of Evidence* 285-86 (1995).

In sum, we find that Rule 609 does not permit corporate convictions to be used to impeach the credibility of employee witnesses who were not directly connected to the underlying criminal act. Since there was no evidence of such a connection in the present case, the district court properly excluded the Georgia-Pacific convictions as improper impeachment evidence.

The order of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Appendix A

Filed September 26, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7045

LINDA S. WALDEN; JAMES P. MURPHY;
GEORGE C. POIRIER, *APPELLANTS*

v.

GEORGIA-PACIFIC CORP.; VIRGIL H. GARDNER;
MICHAEL A. VIDAN; HOWARD SCHUTTE; DAVID M.
WATSON; CURT RIGGIN; ROBERT LINDSEY; JAMES R.
HURD; FELMER CUMMINS; GEORGE FOSTER; RICH
MOODY; JOHN DOE; JANE DOE, *APPELLEES*

On Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. No. 92-cv-00735)

Argued: June 5, 1997

Before: BECKER, SCIRICA, *Circuit Judges*, and
KELLY, *District Judge*.*

(Opinion Filed: September 23, 1997)

ORDER

It appearing that by reason of certain mechanical errors in the final production of the above opinion in chambers, a non-final draft was inadvertently filed, it is hereby ORDERED that the enclosed amended opinion be filed to replace the opinion filed September 23, 1997.

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*Honorable James McGirr Kelly, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

BY THE COURT:

/s/ Edward R. Becker
CIRCUIT JUDGE

DATED: September 26, 1997

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED NOVEMBER 20, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-7045

(D.C. Civ. No. 92-cv-00735)

LINDA S. WALDEN; JAMES P. MURPHY; GEORGE C. POIRIER,

APPELLANTS

v.

GEORGIA-PACIFIC CORP.; VIRGIN H. GARDNER; MICHAEL A. VIDAN; HOWARD SCHUTTE; DAVID M. WATSON; CURT RIGGIN; ROBERT LINDSEY; JAMES R. HURD; FELMER CUMMINGS; GEORGE FOSTER; RICH MOODY; JOHN DOE; JANE DOE

APPELLEES

Present: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, *Circuit Judges* and KELLY, *District Judge**

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* As to panel rehearing only.

Appendix B

SUR PETITION FOR PANEL REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

s/ illegible
Circuit Judge

DATED: NOV 19 1997

c.c./ D.K.
R.E.
K.I.
D.W.